IN THE HIGH COURT OF BOMBAY AT GOA, PANAJI

WRIT PETITION NO. 66 OF 2002

1. Smt. Nilima Narayan Naik,
widow of Narayan Damodar
Naik, residing at House
No.C/4/64, Mala,
Fontainhas, Panaji-Goa.

2. Shri Jaylal Damodar Naik,
major, businessman,
Laxmi Lodge, Station Road,
Margao, Goa and holding
Power of Attorney for
Petitioners No.1, 3, 4 and 5.

3. Shri Devadatta Damodar Naik,
major, businessman, Laxmi
Lodge, Station Road,
Margao, Goa.

4. Shri Ashok Damodar Naik,
C/o Nityanand Transport,
Opp. Pharmacy College,
Panaji, Goa.

5. Shri Manguesh Damodar Naik,
major, businessman, Laxmi
Lodge, Station Road,
Margao, Goa. ... Petitioners.

versus

1. Shri Umakant Ramakrishna Naik,

2. Shri Pradeep Ramakrishna Naik,

3. Shri Dharmendra Ramakrishna Naik,

4. Shri Kashinath Ramakrishna Naik,

5. Shri Mahabaleshwar Ramakrishna
Naik.
All major. businessman, residing
at House No.C/4/64, Mala,
Fontainhas, Panaji, Goa.

6. M/s. Navelkar Estate Developers,
having its principal place of
business at "Ganesh Prasad",
Near Hotel Rajdhani,
Dr. A. B. Road, Panaji, Goa. ... Respondents.

Mr. S. G . Dessai, Senior Advocate with Mr. Rohit Bras de Sa, Advocate for the Petitioners.

Mr. S. D. Lotlikar, Senior Advocate with Mr. A. D. Bhobe, Advocate for the Respondent Nos.1 to 5.

CORAM: P. V. HARDAS, J.

DATED: 14TH JUNE, 2002.

ORAL JUDGMENT

Rule made returnable forthwith.

2. This Court by its Order dated 28th March, 2002, had issued notice to the Respondent No.6 for final disposal of the Writ Petition. The Respondent No.6 has been served as per the Report dated 25th April, 2002. Despite service, the Respondent No.6 is absent. Respondent Nos.1 to 5 have given their consent for final disposal of this Writ Petition.

3. The facts necessary for the decision of this Writ Petition are as under:-

The present Respondent Nos.1 to 5 had filed Regular Civil Suit No.578/2000 and the same is pending on the file of the Civil Judge, Senior Division 'B' Court, Panaji, Goa. Earlier, the suit had been registered as Special Civil Suit No.94/1998 and it was renumbered as Regular Civil Suit No.578/2000/B. The present Petitioners No.1 to 5 are the Original Defendants and Respondent No.6 herein is the Original Defendant in the above referred suit. The said suit was filed for a

declaration that the Plaintiff Nos.1 to 5 and the Defendant Nos.1 to 5 are the partners of the firm, M/s. Damodar Kashinath Naik and they hold relationship of trust inter-se and for an injunction, restraining the Defendant Nos.1 to 5 from entering into any transaction in respect of the premises held by the firm on lease without the consent of the Original Plaintiffs.

4. On 18th April, 2000, the present Petitioners/Original Defendants No.1 to 5 filed an application under Section 8 of the Arbitration and Conciliation Act, 1996 contending therein that by virtue of an arbitration agreement between the Petitioners and the Respondent Nos.1 to 5, the dispute between the Petitioners and the Respondent Nos.1 to 5 should be referred to arbitration. On 29th June, 2000, Respondent Nos.1 to 5 filed their reply opposing the application under Section 8 of the Arbitration and Conciliation Act, 1996 filed by the Petitioners herein. In the Petition at para 9, it is stated that the Respondent Nos.1 to 5 at the stage of the arguments on 30th November, 2001, gave their no objection for referring the subject matter in controversy in the suit to arbitration and an endorsement on Exhibit "M-5", which reads as under was made:-

> "No objection for the present application in terms of the prayers therein".

5. The learned Civil Judge, Senior Division,

Panaji, by Order dated 14th February, 2002, dismissed the application filed by the Petitioners/Original Defendants No.1 to 5 under Section 8 of the Arbitration and Conciliation Act, 1996. The principal ground on which the said application was dismissed was that the Plaintiffs had prayed for an injunction against the Defendant Nos.1 to 5 and 6 and cause of action against Defendant No.6 cannot be separated and as Defendant No.6 was not a party to the arbitration agreement, the dispute cannot be referred for arbitration. It is this Order of the learned Civil Judge, Senior Division, Panaji, Goa, which is impugned in the present Petition before me.

6. The Respondent No.6 is absent despite being served with a notice for final disposal of the Petition at the stage of Admission. This Petition is, therefore, taken up for final disposal at the stage of Admission with the consent of the parties.

7. It is an admitted fact that the present Petitioners/Original Defendant Nos.1 to 5 and Respondent Nos.1 to 5/Original Plaintiffs No.1 to 5 are governed by an arbitration agreement. In fact, it has been admitted before the learned Trial Court during hearing of the application filed by the present Petitioners that the present Respondent Nos.1 to 5/Original Plaintiffs No.1 to 5 had no objection for referring the dispute to

arbitration. It is equally true that the present Respondent No.6/Original Defendant No.6 is not a party to the arbitration agreement. The learned Trial Court, however, was not right in dismissing the application of the Petitioners on the ground that as Respondent No.6 was not a party to the arbitration agreement, the cause of action against Respondent No.6 could not be separated. Since, the Petitioners and Respondent Nos.1 to 5 are governed by the arbitration agreement and Respondent Nos.1 to 5/Original Plaintiffs No.1 to 5 had expressed their no objection for referring the dispute to arbitration, according to me, merely because Respondent No.6 is not a party to the arbitration agreement, it would not be proper to deny the settlement of dispute by an Arbitrator.

8. Since, the Respondent No.6/Defendant No.6 is not a party to the arbitration agreement, the suit in respect of the Respondent No.6/Defendant No.6 shall proceed. In respect of the dispute between the Petitioners and Respondent Nos.1 to 5, the same shall be referred to arbitration. The learned Trial Judge has recorded no objection for reference to arbitration, on the statement of Advocate for Respondent No.6. However, since Respondent No.6 is absent, no orders for referring the dispute to arbitration can be passed.

9. In the result, Writ Petition No.66 of 2002 is allowed. The Order passed by the learned Civil Judge, Senior Division, Panaji, in Regular Civil Suit No.578/2000/B is hereby quashed and set aside and the application of the Petitioners, Exh."M-5", under Section 8 of the Arbitration and Conciliation Act, 1996 referring the dispute to arbitration of Plaintiff No.1 to 5 and Defendant Nos.1 to 5 is allowed. The suit in respect of Respondent No.6/Original Defendant No.6 to proceed as per law.

10. Rule made absolute on the above terms with no order as to costs.

(P. V. HARDAS, J .)